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Supreme Court, U.S.
FILED
MAY - 5 2010
OFFICE OF THE CLERK

No. 10-399

In The

Supreme Court of the United States

GLENN SMITH,

Petitioner,

vs.

WALTER McNEIL, Sec.,
of the Department of Corrections,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

APPENDIX FOR PETITION FOR WRIT OF CERTIORARI

GLENN SMITH, pro se
Hardee Correctional Institution
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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 09-14604-G

GLENN SMITH,

Plaintiff-Appellant,

versus

WALTER A. MCNEIL,
Secretary of the Florida Department of Corrections,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Florida

(Filed Feb. 19, 2010)

BEFORE: CARNES, BARKETT and MARCUS, Circuit Judges.

BY THE COURT:

Glenn Smith, in the district court, filed a notice of appeal and a motion to proceed on appeal *in forma pauperis*. The district court denied *in forma pauperis* status, certifying that the appeal was frivolous and not taken in good faith. However, the district court did not assess the $455.00 appellate filing fee, as is now required under the Prison Litigation Reform Act

of 1995 (April 26, 1996); *see* 28 U.S.C. § 1915 (as amended).

Smith has consented to pay the $455.00 filing fee, using the partial payment plan described under 28 U.S.C. § 1915 (as amended). Thus, the only remaining issue is whether the appeal is frivolous. See § 1915(e)(2)(B)(i). This Court now finds that the appeal is frivolous, DENIES leave to proceed, and DISMISSES the appeal.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA TALLAHASSEE DIVISION

GLENN SMITH,

Plaintiff,

vs.

CASE NO. 4:08-CV-321-SPM/AK

WALTER MCNEIL,

Defendant. /

ORDER ADOPTING REPORT AND RECOMMENDATION

THIS CAUSE comes before the Court for consideration of the Magistrate Judge's Report and Recommendation (doc. 27). Plaintiff has been afforded an opportunity to file objections pursuant to Title 28, United States Code, Section 636(b)(1). Plaintiff, who is pro se, filed an objection (doc. 28). Pursuant to Title 28, United States Code, Section 636(b)(1), I have conducted a de novo review of the sections of the report to which objections have been made. I find that the Report and Recommendation is correct and should be adopted.

Plaintiff's objects to the Magistrate Judge's finding that the Plaintiff's claim of Equal Protection Clause and Due Process Clause violations, stemming from the Department of Correction's refusal to reimburse him for photocopying fees, fails to state a claim

upon which relief can be granted. The Supreme Court recently expressed a new standard in *Bell Atlantic Corp., et al. V. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 1964-65 (2007), holding:

> While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegation . . . [f]actual allegations must be enough to raise a right to relief above the speculative level[.]

In doing so, the Court emphasized that it was not requiring a fact pleading of specifics, but only enough facts to show that a claim to relief is plausible. *Id.*, at 1974. Pro se complaints are to be held to a less stringent standard than those drafted by an attorney. *Wright v. Newsome*, 795 F.2d 964, 967 (11th Cir. 1986). However, a plaintiff is still required to "set forth factual allegations, either direct or inferential, respecting each material element necessary to sustain recovery under some actionable legal theory." *Worst v. Hart*, 1995 WL 431357, *2 (N.D. Fla. 1995).

The question of whether an inmate has a constitutional entitlement to reimbursement of photocopying fees, after a Florida state appellate court ruled that the administrative rule which served as the basis for the Department of Correction's imposition of such fees was invalid because it was not supported by specific legislative authority[1], has already been

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[1] *Smith v. Florida Dept. of Corrections*, 920 So.2d 638 (Fla. App. 1 Dist. 2005).

litigated in this District. In *Sears v. Moore*, 2006 WL 3483491 (N.D. Fla. 2006), District Judge Smoak adopted the Report and Recommendation of Magistrate Judge Elizabeth M. Timothy, and dismissed the complaint of an inmate asserting a constitutional claim for reimbursement of photocopying fees. This Court agrees with the reasoning of the District Court in *Sears*, and adopts that reasoning in this case. In the present case, the Plaintiff has failed to state a claim for relief under the Equal Protection Clause, because he has failed to allege that the refusal to reimburse him for photocopying fees was motivated by a discriminatory purpose, and he is not similarly situated to insolvent inmates who had liens from photocopying fees removed from their accounts. Additionally, the refusal to reimburse the Plaintiff for fees incurred in exchange for photocopying service does not constitute and unconstitutional deprivation of property, as there is no constitutional right to free photocopying for inmates. *See Wanninger v. Davenport*, 697 F.2d 992, 994 (11th Cir. 1983) ("[J]ail officials do not necessarily have to provide a prisoner with free, unlimited access to photocopies . . . in order to protect the prisoner's right to access the courts.").

Accordingly, it is hereby ORDERED AND ADJUDGED as follows:

1. The Magistrate Judge's Report and Recommendation (doc. 27) is *adopted* and incorporated by reference into this order.

2. The Defendant's Motion to Dismiss (docs. 19) is *granted*.

3. This case is dismissed for failure to state a claim upon which relief may be granted.

DONE AND ORDERED this *tenth* day of August, 2009.

s/ Stephan P. Mickle
Stephan P. Mickle
Chief United States
District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

GLENN SMITH

VS

WALTER MCNEIL

CASE NO.
4:08-cv-00321-SPM-AK

JUDGMENT

Pursuant to and at the direction of the Court, it is

ORDERED AND ADJUDGED that the Plaintiff, GLENN SMITH take nothing and the Defendant's, WALTER MCNEIL, Motion to Dismiss is GRANTED and this case is DISMISSED for failure to state a claim upon which relief may be granted.

WILLIAM M. McCOOL,
CLERK OF COURT

August 10, 2009
DATE

s/ KELLI MALU
Deputy Clerk: Kelli Malu

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 09-14604-G

GLENN SMITH,

Plaintiff-Appellant,

versus

WALTER A. MCNEIL,
Secretary of the Florida Department of Corrections,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Florida

(Filed Apr. 16, 2010)

BEFORE CARNES, BARKETT and MARCUS, Circuit Judges.

BY THE COURT:

Glenn Smith has filed a motion for reconsideration of this Court's order dated February 19, 2010, denying his motion for leave to proceed in his underlying civil rights complaint, 42 U.S.C. § 1983. Upon review, Smith's motion for reconsideration is DENIED because he has offered no new evidence or

arguments of merit to warrant relief. *See* Fed.R.App.P. 40(a)(2).

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA,
TALLAHASSEE DIVISION

Glenn Smith, Plaintiff, on behalf of himself and all others similarly situated,

v.

Walter A. McNeil, Secretary of Corrections, in his official capacity, Defendant.

Case No. 4:08-CV-321-SPM/AK

Class Representation
Jury Trial Demanded

Complaint under the Civil Rights Act,
42 U.S.C. section 1983

A. Cause of Action

1. This is a civil rights complaint pursuant to Title 42 U.S.C. section 1983 filed by Glenn Smith, a State of Florida prisoner for injunctive relief.

2. Under color of state law is Florida Department of Corrections (FDC), for which state department Walter A. McNeil, Secretary of Corrections is responsible, in violation of the due process and equal protection clauses of the fourteenth amendment to the Constitution of the United States, deprived the plaintiff of monies taken pursuant to an FDC rule found constitutionally invalid by the state courts.

B. Jurisdiction

3. This court has jurisdiction over plaintiff's federal claims pursuant to 28 U.S.C. sections 1331 and 1343(a)(3).

C. Statement of Facts

4. Plaintiff Glenn Smith is a prisoner in the custody of the FDC, FDC number 880144, currently incarcerated at Martin Correctional Institution, 1150 S.W. Allapattah Road, Indiantown, Fl. 34956-4397. Plaintiff has paid the FDC illegal copy costs since his commitment to the FDC in 1992.

5. Defendant, Walter A. McNeil, Secretary of Corrections, is the state official who is "head of the Department of Corrections" and "responsible for planning, coordinating, and managing the corrections system of the state," sec. 20.315(2), Fla. Stat. He is sued by the plaintiff in only his official capacity for injunctive relief only.

6. Plaintiff Glenn Smith and fellow inmate Thomas Perry Wells, Jr., sought for and prevailed in Florida courts for a declaration "that the administrative rule which allows the Department of Corrections . . . to charge inmates for photographic copying services is not supported by a specific grant of legislative authority and is, thus, invalid." *Smith v. Florida Department of Corrections,* 920 So.2d 638, 638 (Fla. 1st DCA 2005) *rev. denied* 923 So.2d 1162 (Fla. 2006).

7. Subsequent litigation by plaintiff Smith and Wells of the relief requested pursuant to the declaration of the refund of copy costs paid to the FDC under the invalid rule resulted in the plaintiff being denied this relief even though he cited the analogous federal case law of *Harper v. Virginia Department of Taxation,* 539 U.S. 86, 101, 113 S.Ct. 2510, 2519, 125 L.Ed.2d 74 (1993) ("if no . . . predeprivation remedy exists, 'the Due Process Clause of the Fourteenth amendment obligates the state to provide meaningful backward-looking relief to rectify any unconstitutional deprivation'" (citations omitted)) in his lower state court Motion for Supplemental Relief, p. 1, Appendix A, and in his state appellate court Initial Brief of Appellant, p. 6, Appendix B, *see Smith v. Florida Department of Corrections*, 953 So.2d 638 (Fla. 1st DCA 2007) (reversed on unrelated issue only) and argued on equal protection violation in his Initial Brief of Appellant, Appendix B, p.9.

8. Plaintiff then exhausted his FDC administrative remedies seeking a refund of the illegally collected copy costs paid. *see* Appendix C, to which FDC officials regarding acknowledged that "lien balances for legal copy costs were voided," but denied any refund, finally relying on the court's decision in *Vale v. McDonough,* 958 So.2d 966, 967 (Fla. 1st DCA 2007) wherein the court declined to apply the decision in *Smith,* 920 So.2d 638, "retroactively" and denied the relief requested of that petition of "a refund [of] copying costs for his legal papers." The *Vale* court's decision was reasoned solely upon an interpretation

of state administrative law based upon prior cases extending prospective relief only from the invalidation of administrative rules, but no law that dealt with an administrative user fee or tax.

Class Representation Allegations

9. Pursuant to Fed. R. Civ. P., 23, this action is brought by plaintiff as a class action, on his own behalf and on behalf of all others similarly situated who as past and present prisoners who have been or are in the custody of the Florida Department of Corrections were subjected to legal materials copy costs payments pursuant to the FDC rule found invalid in *Smith,* 920 So.2d 638 from the 1983 enactment of the invalid rule until the FDC ceased to collect copy costs payments pursuant to the invalid rule in January 2006.

12. The exact number of the members of the class, as identified and described in this complaint, is not known, but it is estimated that there are not less than 20,000 members. The class is so numerous that joinder of the individual members in this action is impracticable.

13. The claim of the plaintiff as a representative party raises questions of law and fact common to the questions of law and fact raised by each member of the class, namely that each member of the class is entitled to a refund of monies illegally collected for legal copies under the invalidated FDC rule.

14. The claim of the representative party is identical to the claims of all members of the class in that they were injured in the same manner by application of the invalid FDC rule.

15. Plaintiff, as representative party, though competent requested class counsel, *see* Motion for Court to Request Class Counsel filed contemporaneously with this Complaint, can fairly represent the interest of each member of the class because plaintiff and the members of the class have identical interests in the relief sought and through counsel will vigorously prosecute this action to its successful completion.

16. This action is properly maintainable as a class action pursuant to Fed. R. Civ. P. 23(b)(2) in that the party opposing the class has acted on grounds applicable to all members of the class, thereby making final injunctive relief concerning the class as a whole appropriate.

16. The particular facts and circumstances that support the conclusion required of the court in determining that the action may be maintained as a class action pursuant to Fed. R. Civ. P. 23(b)(2) under which it is alleged that the claim is maintainable on behalf of a class are:

17. Since 1983 the FDC has by rule been collecting costs for legal materials copies. This rule was invalidated by a state court in *Smith*, 920 So.2d 638. Al former and current FDC inmates who have paid costs have due process and equal protection entitlements to a refund of the illegally collected monies.

D. Demand for Judgment

18. The plaintiff requests that this court enter an injunction ordering the defendant, Walter A. McNeil, as Secretary of Corrections, to refund to the plaintiff all of the legal copy costs fees collected from the plaintiff pursuant to the unconstitutional FDC copy costs rule.

20. The plaintiff requests that this court enter a judgment against the defendant Secretary of Corrections for the costs of this action and for all other relief the court determines is just and proper.

I declare under penalty of perjury that the foregoing is true and correct. Executed on 6-30-08.

/s/ Glenn Smith

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